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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHICAGO HOUSING AUTHORITY,
PETITIONER

v.

JEROME HUNT,
RESPONDENT

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a local government agency may be liable under 42 U.S.C. § 1983 for discharging an employee in violation of his constitutional rights when the agency's official policies are established by a seven-member Board and (1) the discharge was in contravention of official agency policy, (2) the termination was approved by only one member of the Board, and (3) the other six Board members were not aware of and did not participate in the decision to discharge the employee.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, two former employees of the Chicago Housing Authority, James Gilmartin and Charles Clarke, were defendants-appellants in the court below. They are not petitioners in this Court because the court of appeals reversed the judgments against them. Another former CHA employee, Winston Moore, received a favorable jury verdict at trial and was not a party in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The Chicago Housing Authority ("CHA") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (App. A, *infra*, 1a-26a) is unreported, but the court's ruling is listed in the table of decisions appearing at 972 F.2d 351, and the text of the court's opinion is available on both Westlaw (Allfeds database) and Lexis (1992 U.S. App. LEXIS 20161). The opinion of the district court (App. B, *infra*, 27a-30a) is also unreported, but the text of its opinion is available on Westlaw (1990 WL 133228) and Lexis (1990 U.S. Dist. LEXIS 12025) as well.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1992. A timely petition for rehearing was denied on September 14, 1992. App. C, *infra*, 31a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The text of 42 U.S.C. § 1983 is set forth in Appendix D, *infra*, 32a.

STATEMENT

The CHA is a local government agency that provides public housing for low- and middle-income residents of the City of Chicago. Jerome Hunt, a former CHA employee, sued the CHA and three of its former employees under 42 U.S.C. § 1983 after being discharged from his job, claiming essentially that he was fired for criticizing the elevator service at CHA buildings in violation of his First Amendment rights and his rights to procedural and substantive due process. The three individual defendants all have been exonerated of liability. App., *infra*, 2a n.1, 13a.[1] As for the CHA (the one remaining defendant), the court of appeals held that it was liable because "the CHA was directly responsible for firing Mr. Hunt" in violation of his constitutional rights. *Id.* at 17a.

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[1] In addition to the citations to the Appendix, *infra*, the relevant factual materials will be cited as follows. Documents entered on the district court's docket sheet and contained in the record on appeal will be referred to as "R." followed by the docket number and page number if applicable. The trial transcript will be referred to as "Tr.," and the parties' trial exhibits will be identified as "Pl. Ex." and "Def. Ex."

This Court has emphasized that a local government agency cannot be held liable under § 1983 unless the "officials or governmental bodies who speak with *final policymaking authority* for the local governmental actor" have made decisions which "caused the deprivation of rights at issue by policies which affirmatively command that it occur." *Jett* v. *Dallas Indep. School Dist.*, 491 U.S. 701, 737 (1989) (emphasis added). The CHA's final policymaking body is its Board of Commissioners (App., *infra*, 8a), but the seven-member Board did not fire Hunt; rather, Hunt was fired by lower-level officials "with the approval of" *only one* Board member. *Id.* at 6a. Moreover, the Board had adopted personnel policies that prohibited discharging Hunt in violation of his constitutional rights. Despite the CHA's official policies, and although there was no evidence that the other six Board members even knew that Hunt had been fired (let alone evidence that they participated in that decision), the court below held—without explanation—that the evidence was "sufficient" (*id.* at 26a) to impose liability on the CHA. However, in upholding liability based on the acts of a single Board member, the court of appeals has effectively made a clear end-run around this Court's longstanding prohibition on *respondeat superior* as a basis for municipal liability under § 1983.

1. Hunt's Employment By The CHA. The CHA hired Hunt in 1980 as "resident elevator representative." In that job, Hunt was a member of the CHA Elevator Committee (disbanded in 1981) and worked to improve elevator service in CHA buildings. Hunt often attended the Board's public meetings, where he criticized the maintenance and repair of CHA elevators.[2] App., *infra*, 2a-3a.

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[2] It was well known at the CHA in the early 1980s that there were serious problems with CHA elevators, because the elevator mechanics were doing a poor job and were submitting false records

(Footnote continued on following page)

After Hunt did so at a January 1982 meeting, Andrew Mooney, then the CHA's Executive Director and later the Board's Chairman, told Hunt:

> Mr. Hunt, I would prefer if you did not yell at the board * * *. I'm sorry I'm raising my voice, but I finally have gotten tired of you talking to this board this way. Everyone else who came and approached this board today was treated respectfully, they spoke to the board in an appropriate manner. * * * And I apologize up front for raising my own voice, but there is a point at which the Authority and the respect of this board needs to be treated properly.

Pl. Ex. 53, pp. 32-33. Shortly after this meeting Hunt received a satisfactory evaluation, his probationary status was lifted, and he got a raise. Tr. 96-97, 327-29; Def. Exs. 10, 12; Pl. Ex. 10.

Because he was frustrated with the limited responsibilities that came with his job, Hunt asked the Board repeatedly to end his employment. He did so at Board meetings on May 12, 1981 (Pl. Ex. 51, pp. 33-34), September 8, 1981 (Pl. Ex. 52, pp. 88-89), and January 12, 1982 (Pl. Ex. 53, p. 33). At a Board meeting on November 23, 1982, Hunt said:

> I am paid by y'all, and I am not doing anything. * * * I don't know nothing. I am just being paid. And I wish y'all would do something about that soon.

Pl. Ex. 54, pp. 36, 41. Commissioner Patrick Nash responded by stating that he would "bring it up." *Id.* at

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[2] *continued*
in support of their requests for payment. Tr. 37, 44-45, 51, 71-72, 85-89, 515, 560-64. The CHA initiated several investigations of the mechanics, and two of the individual defendants in this case assisted in a five-part television series that publicized the mechanics' wrongdoing. Tr. 218-19, 717-20, 727-28.

41. When Hunt reiterated his point by saying, "Stop paying me, will you?," Chairman Mooney remarked, "Perhaps that is the best thing to do." *Id.* at 42. Hunt immediately responded, "Well, do it." *Ibid.*

The Board considered Hunt's request to terminate him at its next meeting, an executive session on December 20, 1982. At that meeting, Commissioner Estelle Holzer remembered Hunt as

> the gentleman who said we paid him $25,000 or something a year, and he doesn't do a thing. * * * He was asked what he was supposed to be doing, and he said he was doing nothing, and he received money, and was wishing he could get off rather than receive money.

Pl. Ex. 56, p. 13. Chairman Mooney said that he understood that Hunt "has difficulty accepting supervision," but when asked if he was "moving to fire" Hunt, Mooney replied flatly, "I am not." *Id.* at 15. Commissioner Nash stated that he was "reluctant" to discharge Hunt and that a "revised job description" for Hunt was necessary; since the CHA elevator committee "doesn't exist any more," Hunt's job description "isn't valid anymore." *Id.* at 17.

Commissioner Leon Finney noted initially that, "I have a problem seeing why he would come to a meeting and publicly vent his frustration" (*id.* at 16), but Finney went on to say that

> *I don't think this board ought to get involved in termination or hiring. * * * I don't want to get involved in hiring and firing at this level.* That is the wrong level for us. I think the appropriate thing for us to do is to instruct the Executive Director to take this matter under consideration, to deal with it and get it out of here.

Id. at 17-18 (emphasis added). Because the decision whether to retain Hunt was "an inappropriate matter for

us to wade into," Commissioner Finney proposed to "let the staff handle it." *Id.* at 18, 19. After noting that Hunt's job description had become "obsolete," Finney suggested that Hunt (1) be given an "appropriate job description * * * that is in agreement with the present organizational structure," (2) "be placed under someone's supervision," and (3) "be given a period of time to conform to that job description." *Id.* at 19, 20. Finney concluded by saying that if Hunt "doesn't perform" during that time under a new job description "that is meaningful within the organizational structure," he should then (and only then) "be taken out of the organization" by "follow[ing] the usual personnel procedures."[3] *Id.* at 19, 20. After Commissioner Finney's remarks, Chairman Mooney closed the discussion by summarizing the "consensus" that the Board had reached. *Id.* at 20. First, Executive Director Elmer Beard was directed to "revise the [job] description."[4] *Ibid.* Second, any future decisions about Hunt's job were to be made by Executive Director Beard, and he was given the discretion to "take appropriate action based on that [revised] job description." *Ibid.* In short, the Board's consensus was to give Hunt an opportunity to perform under a revised job description, and Executive Director Beard was given the authority to make future decisions concerning Hunt's job, but was required to "follow the personnel policies." *Ibid.*

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[3] The CHA personnel policies stated that the CHA "shall conform" to federal law (Pl. Ex. 46, § 2001) and explicitly recognized that employees "retain[ed] the privilege of disagreeing with the policies established by the Commissioners" (*id.*, § 2003.4). The personnel policies further provided that "[a]ll policies, policy amendments or additions must be approved by the Commissioners." *Id.*, p. 2. Finally, the Executive Director was given the discretion to "alter procedures" in certain situations, but only if he acted "within the framework of the established policies." *Ibid.*

[4] The Executive Director attended Board meetings, but was not one of the seven Board members. See Pl. Ex. 56, p. 1.

In the next two months, lower-level officials discussed several times whether Hunt should be discharged. On January 19, 1983, the manager at one building, Michael Davis, asked for a hearing concerning Hunt because Hunt had committed "*several* acts of gross insubordination" and had "harass[ed]" Davis's office. Def. Ex. 32. At Mooney's direction, James Gilmartin (the CHA's newly-hired Personnel Director) held the hearing; the attendees were all non-policymakers and included Gilmartin and Davis. Pl. Ex. 29; Tr. 140, 151. Hunt was not informed of the meeting (Tr. 122-23), and it resulted in a decision not to fire Hunt because there was insufficient evidence or documentation supporting Davis's allegations. Tr. 184-85; Pl. Ex. 29. On two subsequent occasions, however, Gilmartin did recommend to Mooney that Hunt be discharged: once for allegedly attending a CHA Board meeting on CHA time, in violation of a CHA rule; and once for coming to work drunk and breaking a window. Mooney did not follow either recommendation. Pl. Exs. 30-31, 34-35; Def. Exs. 16-17; Tr. 105, 129, 591, 596.

2. Hunt's Discharge. In April 1983, Hunt twice failed to return to the office to sign out by 4:30 p.m., as required by CHA policy and as ordered by Charles Clarke, Hunt's supervisor. Pl. Ex. 37; Tr. 131-33, 165, 432-34, 553-54, 606, 616. When Clarke questioned Hunt about it, Hunt called Clarke a "damn liar." Tr. 133, 429-30, 607-08. According to Clarke, Hunt said he did not have to sign out (Pl. Ex. 37); Hunt admitted that he "might have said that" (Tr. 613). As a result of this incident—and because Hunt had "been guilty of gross insubordination on other occasions"—Clarke suspended him without pay, pending an investigation. Pl. Ex. 37; Tr. 307-08.

Clarke recommended Hunt's discharge to Gilmartin, who recommended to Mooney that Hunt be fired. Pl. Ex. 39; Tr. 182-83. Although terminations were "[g]enerally" ap-

proved by "the full board" (Tr. 141), Hunt's termination was not; instead, Mooney and Executive Director Beard (a non-Board member) told Gilmartin—without receiving Board approval—that the two of them "agree[d] with your recommendation." Pl. Ex. 40; Tr. 142. On May 20, 1983, Gilmartin informed Hunt that

> [t]he Chairman has approved the recommendation of your supervisor and the Director of Personnel to terminate your employment because [of] a documented pattern of disciplinary actions taken against you from direct disobedience of a supervisor's directive through gross insubordination and destructive and abusive behavior.

Pl. Ex. 41. There was no evidence that the other six members of the Board knew that Hunt was fired (or even that his discharge had been recommended), much less that they participated in the decision to end his employment.

3. Proceedings Below. Hunt brought suit against the CHA and three of its former employees (Gilmartin, Clarke and Winston Moore).[5] At trial, the jury returned a mixed verdict on Hunt's five claims. On the state law claims for breach of contract and retaliatory discharge, the jury found for all of the defendants. On the First Amendment claim, the jury found against the CHA but ruled in favor of each individual defendant. The jury also found against the CHA and two of the individual defendants on Hunt's procedural and substantive due process claims. R. 319, pp. 2-7. The district court denied the defendants' motion for j.n.o.v. (App., *infra*, 27a-30a) and entered judgment for approximately $195,000 in back pay, $76,000 in prejudgment interest and $22,000 in front pay (*id.* at 30a; R. 341,

[5] Hunt did not sue either Mooney or Beard, the two individuals who approved his termination.

380). The court also awarded nearly $262,000 in attorneys' fees.

On appeal, the Seventh Circuit reversed the judgments against the individual defendants (App., *infra*, 13a), but affirmed the judgment against the CHA. The court acknowledged that Hunt's discharge had the approval of only one member of the seven-member Board of Commissioners, Chairman Mooney (*id.* at 6a), but it held nevertheless that the evidence was sufficient to conclude that "the CHA was directly responsible for firing" Hunt (*id.* at 17a). (To find liability on a direct responsibility theory, the jury was instructed correctly that there must have been evidence that "the board decided to discharge Hunt" in violation of his constitutional rights. Tr. 887, 900, 904.)[6] The

[6] The instructions also listed four other possible bases on which the CHA might be liable on Hunt's constitutional claims—none of which the court of appeals held to be a sufficient basis for affirming the judgment against the CHA. The court held that "[t]here is no realistic possibility that the jury based the CHA's liability" on three of those theories: that the CHA "failed to investigate" Hunt's discharge; that it "approved the discharge"; and that it "delegated its policymaking authority" to the individuals who fired Hunt. App., *infra*, 17a.

The court did not mention a fourth alternative that applied only to the procedural due process claim: that the CHA Board "acquiesced in a longstanding practice or custom of discharging employees without fair process." Tr. 900 (jury instruction). A verdict on that theory could not have been sustained. There was absolutely no evidence that the Board knew that Gilmartin—who joined the CHA as Personnel Director five months before Hunt's discharge (Tr. 188-89; Pl. Ex. 56, pp. 2-11)—generally did not hold pretermination hearings, let alone evidence that the Board acquiesced in such a practice. Moreover, there was no evidence that the number of employees who had not received pretermination hearings, or the length of time during which hearings purportedly did not occur, was great enough to constitute a " 'persistent and widespread' " practice that was " 'so permanent and well settled as to constitute a "custom or usage" with the force of law.' " *Monell* v. *New York City Dep't of Social Services*, 436 U.S.

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court of appeals did not attempt to explain how its *per curiam* decision could be reconciled with this Court's decisions holding that a local government agency can be held liable under § 1983 only if the constitutional deprivation occurred as a result of an official policy adopted by the agency's final policymaking body.

REASONS FOR GRANTING THE PETITION

Ever since *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658 (1978), this Court has adhered consistently to the principle that a local government agency cannot be held liable under § 1983 unless the agency's final policymakers committed a constitutional violation that caused plaintiff's injury, or adopted policies that caused the violation. The Seventh Circuit's ruling here effectively evades the rules established in *Monell* and its progeny whenever, as is often the case, an agency's final policymaker is a multi-member body: the court of appeals upheld liability against the CHA even though the act that allegedly violated Hunt's rights—his termination—was approved by only one of the seven members of the CHA's Board of Commissioners. Indeed, there was not a shred of evidence that the other six Board members even knew that Hunt's termination had been recommended or that Hunt had in fact been fired. Moreover, the Board as a whole had adopted specific personnel policies—completely

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[6] *continued*

658, 691 (1978) (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970)). Indeed, there was no evidence that *any* CHA employee other than Hunt was even discharged in 1983, much less that anyone else was improperly denied a pretermination hearing. A single constitutional violation is insufficient to establish that a widespread practice exists. *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 823-24 (1985) (plurality opinion).

ignored by the court of appeals—that required all CHA officials to follow the requirements of federal law in making employment decisions and specifically recognized employees' rights to disagree with the Board of Commissioners. Imposing liability in these circumstances because of the actions of one member of a policymaking body amounts to nothing more than vicarious liability—a theory explicitly rejected by this Court in *Monell* and subsequent decisions.

In addition to being flatly inconsistent with this Court's decisions, the Seventh Circuit's ruling also exacerbates the split in the circuits on this issue. Like the Seventh Circuit in this case, the Eighth Circuit has held that a local government agency can be liable under § 1983 when a single member of a policymaking board violates someone's constitutional rights. The Fourth, Fifth and Ninth Circuits have reached precisely the opposite result, holding that § 1983 liability cannot be imposed on municipalities simply because of the conduct of one member of a policymaking body. See pp. 18-19, *infra*.

It is difficult to imagine an issue that could have a more profound effect on § 1983 litigation against local government agencies (other than the question whether to overrule *Monell* itself). In most local governments, the final policymaker on most issues is a collective body, rather than a single individual. A rule that subjects an agency or municipality to liability because of the actions of a single member of a multi-member policymaking body will vastly increase the scope of potential § 1983 liability for local government agencies—a result that is plainly inconsistent with this Court's decisions interpreting § 1983.

This Court has consistently followed the rule that local government agencies cannot be liable under § 1983 because of the misdeeds of an employee who is not a final

policymaker. In this case, the court of appeals' decision is so plainly and egregiously inconsistent with that principle that it should not be allowed to stand, and summary reversal is justified. Given the gravity of the Seventh Circuit's error and the adverse practical consequences it portends for financially-strapped local governments, review by this Court is plainly warranted.

I. THE COURT OF APPEALS' HOLDING THAT MUNICIPAL LIABILITY MAY BE BASED ON THE CONDUCT OF ONE MEMBER OF A SEVEN-MEMBER BOARD IS FLATLY INCONSISTENT WITH *MONELL* AND ITS PROGENY.

This Court has held that, in § 1983 actions, " 'Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort.' " *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 477 (1986) (quoting *Monell*, 436 U.S. at 691). Thus, this Court has emphasized that "the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution." *Monell*, 436 U.S. at 690. The purpose of the "official policy" requirement is "to distinguish acts of the *municipality* from acts of *employees* of the municipality" and to allow recovery only for "acts which the municipality has officially sanctioned or ordered." *Pembaur*, 475 U.S. at 479, 480. A municipality may be liable under § 1983 "only where the municipality *itself* causes the constitutional violation." *City of Canton* v. *Harris*, 489 U.S. 378, 385 (1989). As a result, *respondeat superior* has been explicitly "rejected" under § 1983 (*id.* at 392); a municipality is not liable under § 1983 simply "because it employs a tortfeasor" (*Monell*, 436 U.S. at 691).

Instead, a local government agency acts pursuant to an "official policy"—and is therefore subject to § 1983 liabil-

ity—only when its "final policymak[ers]" have made "decisions [which] have caused the deprivation of rights at issue." *Jett*, 491 U.S. at 737. Local governments may be liable under § 1983 " 'only where' " municipal policymakers make a " 'deliberate choice to follow a course of action.' " *Harris*, 489 U.S. at 389 (quoting *Pembaur*, 475 U.S. at 483-84 (plurality opinion)). Thus, "only those municipal officials who have 'final policymaking authority' may by their actions subject the government to § 1983 liability," and liability attaches only when the constitutional deprivation occurred "pursuant to a policy adopted by the official or officials responsible under state law for making policy in *that area* of the city's business." *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 123 (1988) (plurality opinion). Accord *Pembaur*, 475 U.S. at 481 (plurality opinion) (municipal liability attaches "only" where the decisionmaker who causes the constitutional deprivation "possesses final authority to establish municipal policy with respect to the action ordered").

When the final policymaker is a multi-member body, it is clear that decisions made by *that body as a whole* may subject a local government agency to § 1983 liability. *E.g.*, *Pembaur*, 475 U.S. at 480 ("a municipality may be liable under § 1983 for a single decision *by its properly constituted legislative body*") (emphasis added); *Owen* v. *City of Independence*, 445 U.S. 622 (1980) (city liable under § 1983 where city council passed resolution firing police chief without pretermination hearing). This Court has never suggested, however, that actions taken by one member of a legislative body—without even the knowledge or approval of the other members—can establish official government policy under *Monell*. To the contrary, in cases where, as here, final policymaking authority rests with a multi-member body and has not been delegated to other officials, this Court has adhered to the principle that a

decision by the final policymakers *as a group* is required before liability may be imposed under § 1983. See *Pembaur*, 475 U.S. at 483 n.12 (plurality opinion) ("if county employment policy was set by the Board of County Commissioners, *only that body's decisions would provide a basis for county liability*"; once the Board sets the policy, a decision by a non-policymaker "to act unlawfully *would not be a decision of the Board*") (emphasis added); *Praprotnik*, 485 U.S. at 129-30 (plurality opinion) (following *Pembaur*).

The reason that § 1983 liability cannot be imposed based on the acts of a single member of a legislative body is elementary: the final policymaker under state law is the body as a whole, not each individual who is a member of the body at any given time. See *Pembaur*, 475 U.S. at 483 n.12 (plurality opinion); see also *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 821 (1985) (plurality opinion) (a § 1983 plaintiff cannot "establish municipal liability without submitting proof of a single action taken by a municipal policymaker"); *id.* at 829 (Brennan, J., concurring) ("the plaintiff must predicate his recovery on some particular action taken by the city, as opposed to an action taken unilaterally by a nonpolicymaking municipal employee").

Here, for example, the parties agreed, and the jury was instructed, that the CHA's final policymaker under Illinois law was its seven-member Board of Commissioners. App., *infra*, 8a; Tr. 886, 899. See also *Parker* v. *Chicago Housing Authority*, 730 F. Supp. 115, 119-20 (N.D. Ill. 1989). The Board, however, did not fire Hunt. In fact, the court of appeals conceded that "Mr. Hunt was terminated with the approval of Chairman Mooney and the Executive Director." App., *infra*, 6a; see also pp. 7-8, *supra*. Mooney, of course, was only one member of a seven-member Board, Executive Director Beard was not a member of the Board

at all, and there was no evidence that the other six members of the Board even knew that Hunt had been discharged or that they participated in that decision.[7]

Moreover, while Mooney may have been Chairman of the Board, he was only one of seven Commissioners, and he had no authority to act as the CHA's final policymaker on employment matters. The CHA's Board had adopted the agency's employment policies—in the form of the CHA's personnel policies—and Mooney had no authority to unilaterally abrogate those policies. In fact, the personnel policies provided specifically that any policy

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[7] Hunt argued in the court of appeals that the judgment against the CHA could be sustained because the Board itself decided to fire Hunt at the Board meeting held on December 20, 1982. The court of appeals did not accept that argument, holding instead that Hunt was discharged in May 1983 by Mooney and Beard. App., *infra*, 6a. The court's rejection of Hunt's argument is well supported by the evidence. The transcript of the Board's December 1982 meeting indicates plainly that the Board did *not* decide to discharge Hunt. Indeed, at the end of the Board's discussion—which took place in response to *Hunt's* repeated requests that he be fired—the Board's consensus was that Hunt should *not* be fired, but should be given another chance to perform, and that Executive Director Beard would handle any future decisions about Hunt's job, within the constraints of the personnel policies. See p. 6, *supra*. If the Board had really decided to discharge Hunt in December 1982, the two recommendations to fire Hunt in early 1983 undoubtedly would have been approved—but neither was. See p. 7, *supra*.

The court of appeals also concluded properly that the CHA could not be liable on the theory that it delegated its policymaking authority. App., *infra*, 17a. Giving Executive Director Beard the discretion, in this particular instance, to make future decisions about Hunt's employment was not a delegation of the Board's right to establish official policy on employee terminations. Beard was required to follow the personnel policies (see p. 6 & n.3, *supra*), and an employee does not become a final policymaker by being given the discretion to make decisions in a particular matter. See *Praprotnik*, 485 U.S. at 127 (plurality opinion); *Pembaur*, 475 U.S. at 483 n.12 (plurality opinion); *Harris*, 489 U.S. at 387.

changes "must be approved by the Commissioners." Pl. Ex. 46, p. 2. And the personnel policies prohibited Mooney (or anyone else at the CHA) from discharging Hunt in violation of his constitutional rights: the personnel policies required the CHA to comply with federal law and explicitly granted employees the right to disagree with CHA policies. *Id.*, §§ 2001, 2003.4. In short, the official employment policy of the CHA is expressed in the personnel policies adopted by the Board; "those policies, rather than [Mooney's] departures from them, are the act of the [CHA]." *Praprotnik*, 485 U.S. at 127 (plurality opinion).

Nonetheless, the Seventh Circuit concluded that "the CHA was directly responsible for firing" Hunt. App., *infra*, 17a. In so holding, the court of appeals effectively transformed Chairman Mooney into the CHA's final policymaker with respect to employment policy—even though Illinois law provides, as the parties have agreed all along, that *the Board* is the CHA's final policymaker.

If the Seventh Circuit's decision is allowed to stand—that is, if the conduct of a single legislator can subject a local government agency to liability under § 1983—then the foundation of *Monell* will have been eroded completely. The fundamental holding of *Monell* is that "a municipality cannot be held liable under § 1983 on a *respondeat superior* theory" (436 U.S. at 691), and this Court has "repeatedly reaffirmed" that conclusion (*Praprotnik*, 485 U.S. at 122) (plurality opinion). But imposing liability because of the acts of one member of a collective body—allowing one member to establish official policy for the entire Board—is indistinguishable from the imposition of liability based on a vicarious liability theory. It would subject local governments to liability "where no wrong could be ascribed to municipal decisionmakers," but rather "simply because the municipality hired one 'bad apple.' "

Tuttle, 471 U.S. at 821 (plurality opinion).[8] This Court has been unwavering in rejecting attempts to evade the rule laid down in *Monell*,[9] and this latest attempt to sidestep *Monell*'s requirements should be set aside as well. Official policy can be established only by the governmental body charged by law with that responsibility (here, the Board). That rule would be destroyed if § 1983 liability could be imposed based on the acts of an individual member of a multi-member body.

This Court's decisions establish that a local government agency cannot be liable under § 1983 unless a constitutional violation results from actions taken by, or an official policy adopted by, the agency's final policymakers. The court of appeals discarded that long-established principle in this case; it imposed liability on an agency that it concluded was "directly responsible" for the plaintiff's firing (App., *infra*, 17a), even though there was no evidence that the agency's final policymaker—the Board—was involved in the discharge decision at all. The Seventh Circuit's holding exposes municipalities to § 1983 liability based on a theory much more expansive than any ever adopted by this Court. Because the decision of the court of appeals is fundamentally inconsistent with years of controlling precedent, it should be overturned.

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[8] See also *Tuttle*, 471 U.S. at 831 (Brennan, J., concurring) ("To infer the existence of a city policy from the isolated misconduct of a single, low-level officer, and then to hold the city liable on the basis of that policy, would amount to permitting precisely the theory of strict *respondeat superior* liability rejected in *Monell*").

[9] *E.g.*, *Harris*, 489 U.S. at 392 ("permitting cases against cities for their 'failure to train' employees to go forward under § 1983 on a lesser standard of fault would result in *de facto respondeat superior* liability on municipalities—a result we rejected in *Monell*"); *Tuttle*, 471 U.S. at 823 (plurality opinion) (rejecting "an approach [that] provides a means for circumventing *Monell*'s limitations altogether").

II. THE CIRCUITS ARE DIVIDED ON WHETHER THE CONDUCT OF ONE MEMBER OF A POLICYMAKING BOARD CAN SUBJECT A MUNICIPALITY TO § 1983 LIABILITY.

In addition to being irreconcilable with this Court's decisions, the Seventh Circuit's ruling in this case is particularly significant because it deepens the disagreement between the circuits on the issue whether § 1983 liability can be imposed on a municipality because of the acts of one member of a policymaking body. In answering that question in the affirmative, the Seventh Circuit has joined the Eighth Circuit, which also imposes § 1983 liability on municipalities for the conduct of individual members of a policymaking body. See *Harris* v. *City of Pagedale*, 821 F.2d 499, 506-07 (8th Cir.) (city liable under § 1983 for acts of individual alderman, even though Board of Aldermen acts only as a collective body under state law), *cert. denied*, 484 U.S. 986 (1987). Thus, local government agencies in the Seventh and Eighth Circuits are exposed to potential § 1983 liability far beyond the narrow limits established by this Court in *Monell* and later cases.

In stark contrast, the other courts of appeals that have confronted the precise issue presented here have remained faithful to *Monell* and its progeny, holding that a government agency is not subject to liability under § 1983 simply because one member of a policymaking Board may act improperly. In *Collinson* v. *Gott*, 895 F.2d 994 (4th Cir. 1990), for example, the Fourth Circuit held that under *Monell*, a county Board of Commissioners is not liable as a matter of law for an alleged First Amendment violation committed by the President of the Board at a public meeting. *Id.* at 1004. The court ruled that the Board President's action—not endorsed or condoned by the Board as a whole—was not "an exercise of policymaking power by one empowered to 'make policy' for the county in the matter at issue." *Ibid.* Similarly, the Ninth Circuit held

in *Lake Nacimiento Ranch Co.* v. *County of San Luis Obispo*, 841 F.2d 872 (9th Cir. 1987), *cert. denied*, 488 U.S. 827 (1988), that the conduct of a single member of a county Board of Supervisors did not establish official county policy: "Under California law, Mankins [one Board member] did not have final authority to establish the County's official policy * * *. The Board of Supervisors may only establish official policy by a majority [vote] of the supervisors." *Id.* at 879. And in *Worsham* v. *City of Pasadena*, 881 F.2d 1336 (5th Cir. 1989), the Fifth Circuit held that a mayor who was one of seven members of the city council was not a final policymaker whose actions could subject the city to § 1983 liability; official policy there was set by the council as a whole, not by the mayor individually. See *id.* at 1340-41 (majority opinion) & 1344-45 (opinion concurring in part and dissenting in part).[10]

In the last 15 years, this Court has devoted considerable attention to the standards that must be satisfied before local government agencies may be held liable under § 1983. In recent years, however, the stringent requirements established by this Court have come under increasing attack, and as we have shown, two circuits have now endorsed a means of circumventing *Monell* entirely when the constitutional deprivation was caused by only one member of a municipality's final policymaking body. Because of the resulting conflict in the circuits, municipalities

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[10] See also *Payung* v. *Williamson*, 747 F. Supp. 705, 708-09 (M.D. Ga. 1990) (a mayor—one of seven members of the city council—was not a final policymaker where his actions were subject to review by the other six council members); *Young* v. *Peoria Housing Authority*, 479 F. Supp. 1093, 1097 (C.D. Ill. 1979) (conduct of one member of four-member policymaking Board of Commissioners does not establish official policy, practice or custom); *Todd* v. *Smith*, 407 S.E.2d 644, 647 (S.C. 1991) (acquiescence of some individual city council members in constitutional violation did not establish official policy and thus did not give rise to § 1983 liability), *cert. denied*, 112 S. Ct. 938 (1992).

across the country cannot predict with any degree of confidence whether they might be subject to § 1983 liability due to the acts of a single legislator. This Court should review the Seventh Circuit's decision in this case to resolve this disagreement between the circuits and to ensure that the lower courts follow *Monell* uniformly in the many cases in which a municipality's final policymaker is a multi-member body.

III. THE STANDARD FOR IMPOSING § 1983 LIABILITY ON LOCAL GOVERNMENT AGENCIES PRESENTS A RECURRING AND IMPORTANT ISSUE.

The unresolved circuit split in this area of § 1983 law is especially alarming because the disagreement in the lower courts on this issue will have a profound and adverse impact on local government agencies. In recent years, shifts in federal spending patterns have meant that local governments have assumed greater responsibilities but have less money to meet those obligations.[11] As a re-

[11] A 1990 General Accounting Office study concluded that federal regulation of states and localities grew over the previous decade. General Accounting Office, *Federal-State-Local Relations: Trends of the Past Decade and Emerging Issues* 2 (March 1990) [hereinafter *GAO Report*]. At the same time, federal aid to states and localities was cut substantially, by $17.2 billion in constant dollars in the period from 1978 to 1988. *Id.* at 15. These cuts fell disproportionately on local governments; indeed, federal aid to the states actually grew an average of 1.3% annually between 1978 and 1986, while federal aid to local governments fell an average of 5.5% a year during the same period. *Id.* at 16. See also Dubrow, *Chapter 9 of the Bankruptcy Code: A Viable Option for Municipalities in Fiscal Crisis?*, 24 Urb. Law. 539, 540 n.3 (1992) [hereinafter Dubrow] (citing a U.S. Conference of Mayors survey of fifty cities showing that federal aid comprised only 6.4% of city budgets in 1990, compared with 17.7% in 1980). In short, "the overall pattern has been more federal involvement with less financial support." *GAO Report* at 26. Couple this trend with an often shrinking tax base; with an electorate already loaded down with a heavy

(Footnote continued on following page)

sult, a number of municipalities stand on the brink of insolvency. See Dubrow, 24 Urb. Law. at 539-41; *Bridgeport's Bankruptcy Petition Offers Reminder of the Plight of Cities, States*, Wall St. J., June 10, 1991, at A12. In short, the meager financial resources available to most municipalities are being stretched to the breaking point as local governments struggle to keep their fiscal houses in order—a problem that is exacerbated by the recent difficult economic climate and by the tendency of juries to inflate damage awards when the defendant is a government entity.[12]

Of course, even in the best of times, "the resources of local government are not inexhaustible." *Harris*, 489 U.S. at 400 (O'Connor, J., concurring and dissenting). But regardless of the state of the economy, judicial decisions that increase the likelihood of § 1983 liability will inevitably require a reallocation of limited municipal resources, and "other city services will necessarily suffer." *Ibid.* See also *Tuttle*, 471 U.S. at 819 n.5 (plurality opinion) ("we may assume that decisions on issues [of municipal liability] are appropriately considered by municipalities in ordering their financial affairs").

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[11] *continued*

tax burden and almost always unwilling to support further increases (see *id.* at 52 (discussing passage of California's Proposition 13)); and with the increased crime, homelessness and other social problems that municipalities face, and the deteriorating financial condition of the nation's cities becomes starkly apparent. See, *e.g.*, *In re City of Bridgeport*, 129 B.R. 332, 335 (Bankr. D. Conn. 1991).

[12] One study of jury verdicts in Chicago over a 20-year period found that jury awards against government bodies are substantially larger than awards against individual defendants for the same kind of injuries. Awards against government defendants on average were about twice as high as awards against individual defendants. A. Chin & M. Peterson, *Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials* 28-29 (Rand Corp. 1985).

This Court has recognized that adopting a "lesser standard[ ] of fault" under § 1983 "would open municipalities to unprecedented liability"—a result fundamentally at odds with the holding of *Monell*. *Harris*, 489 U.S. at 391-92. That is exactly what the Seventh Circuit has done here and what the Eighth Circuit did in *Harris* v. *City of Pagedale*. If local governments can be held liable under § 1983 for the conduct of each individual legislator—even if the legislative body that is the final policymaker does not adopt or endorse those individual acts—municipalities will be forced to pay damages in numerous lawsuits that involve, at most, misconduct by individual employees. As a result, municipal liability under § 1983 will increase at an explosive and perhaps fiscally ruinous rate. Since the final policymaker in most units of local government is a collective body—be it a city council, a school board or a board of commissioners—the impact of the expansion of § 1983 liability that the Seventh and Eighth Circuits have endorsed will likely be felt in municipalities across the country. The practical significance of the decision below provides another compelling reason for this Court to review the court of appeals' ruling.

CONCLUSION

The petition for a writ of certiorari should be granted, and (1) the judgment below should be summarily reversed, or (2) the case should be set for briefing and oral argument.

Respectfully submitted.

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DECEMBER 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Argued December 12, 1991

August 19, 1992.

Before
Hon. RICHARD A. POSNER, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

JEROME HUNT,

Plaintiff-Appellee,

No. 90-3614 v.

CHICAGO HOUSING AUTHORITY, a municipal corporation, JAMES GILMARTIN and CHARLES CLARKE,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 84 C 3564
Ann Claire Williams, *Judge.*

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

O R D E R

Jerome Hunt, an employee of the Chicago Housing Authority (the CHA), was a vigorous critic of waste and mismanagement in the CHA's elevator maintenance. He was discharged, and brought suit under 42 U.S.C. § 1983

against the CHA, James Gilmartin, and Charles Clarke,[1] alleging that, in firing him, the CHA and the individual defendants had violated his First Amendment right to free speech and his Fourteenth Amendment rights to procedural and substantive due process. He also asserted state law claims of breach of contract and retaliatory discharge. A jury found in his favor on the constitutional claims, and the defendants appeal. For the reasons set forth in this order, we affirm in part and reverse in part the judgment of the district court.

I

BACKGROUND

A. *Facts*

Jerome Hunt has lived in CHA housing since 1966. He frequently and loudly made his views known on the inadequacy of elevator maintenance in CHA housing. Beginning in 1975, Mr. Hunt attended meetings of the CHA's Board of Commissioners (the Board) almost every month and voiced criticisms of the CHA's program of elevator maintenance. In October 1980, the CHA hired Mr. Hunt as a "resident elevator representative," a newly-created position. Mr. Hunt's duties were to

> 1. Serve as a member of the CHA Elevator Committee.
>
> 2. Present to the Committee the views of residents concerning elevator operational problems.
>
> 3. Inform residents of actions and/or proposed actions of the Elevator Committee.

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[1] Another defendant, Winston Moore, who was sued only on the First Amendment claim, received a favorable verdict and is not a party to this appeal.

4. Maintain close liaison with the Local Advisory Councils and Building Councils, by personal visits, so as to be fully informed regarding elevator service.

5. Assist in formulating a general plan for improvement of elevator conditions and service.

6. Perform related duties as assigned.

Plaintiff's Ex. 3. Mr. Hunt worked at putting into order the work tickets and invoices submitted by the elevator repairmen, kept a record of elevators out of service, wrote numerous reports, and as his job description indicates, served as a member of the Elevator Committee. After the Elevator Committee was disbanded in 1981, Mr. Hunt continued to file reports and to attend the public CHA Board meetings. Apparently Mr. Hunt attended some of these meetings on his own time as a private citizen. He continued to voice his criticisms there: many elevators were out of order on any given day; the repair budget was not well spent; needed parts were unavailable; he believed that repairmen employed by Westinghouse, the company under contract to maintain the elevators, sabotaged the elevators and charged for work that was never done.[2]

At the meetings, on more than one occasion, Charles Swibel, the chairman of the Board, expressed displeasure at Mr. Hunt's voicing his criticisms in public rather than going through the "chain of command" within the agency. At one meeting, Andrew Mooney, who was then the

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[2] Mr. Hunt's charges were not without foundation; the serious inadequacies of CHA management and abuses by the Westinghouse repairmen are discussed in detail in a report prepared by HUD. *See* Plaintiff's Ex. 11 (*Review and Analysis of the Chicago Housing Authority and Implementation of Recommended Changes*, Chapter 12, "Elevator Maintenance" (March 31, 1982)).

Executive Director and later replaced Swibel as chairman, told Mr. Hunt: "Mr. Hunt, I would prefer if you did not yell at the board, whether you are here as a private citizen or as an employee of this Authority. . . . I finally have gotten tired of you talking to this board this way." Another meeting, at which Mr. Hunt was vociferously critical, was also attended by Winston Moore, the CHA's director of security, and James Simpson, the CHA's director of maintenance. According to Mr. Hunt, Winston Moore, the CHA's director of security, sat behind Mr. Hunt, told Mr. Hunt he was not supposed to attend the meetings, repeatedly interrupted him and directed Mr. Hunt's attention to Simpson. When Simpson saw Mr. Hunt after the meeting, Simpson, who was not Mr. Hunt's immediate supervisor, told Mr. Hunt to sign out and go home. Mr. Hunt refused and also refused to give Mr. Simpson a description of his job assignments for the rest of the day. When Simpson later told defendant Charles Clarke, who was Mr. Hunt's supervisor and had also been present at the meeting, that Mr. Hunt had been insubordinate, Clarke placed Mr. Hunt on probation. This was the first time that Mr. Clarke disciplined Mr. Hunt. While on probation, Mr. Hunt performed his job in a satisfactory manner, and February 2, 1982, Mr. Clarke gave Mr. Hunt a satisfactory evaluation and recommended that he be taken off probation.

On December 20, 1982, the Board held an executive session. One of the topics discussed was the job description of the "CHA resident elevator representative." After some discussion, Commissioner Leon D. Finney stated, "I have a problem seeing why [Mr. Hunt] would come to a meeting and publicly vent his frustration" and then,

> I don't think this board ought to get involved in termination or hiring. That is my own judgment. That is why I am having a problem with this individual.

> I think those responsibilities are for the staff positions, and that is how I like to run my organization.
>
> I don't want to get involved in hiring and firing at this level. That is the wrong level for us.
>
> I think the appropriate thing for us to do is to instruct the Executive Director to take this matter under consideration, to deal with it and get it out of here. That is my judgment.

Id. at 17-18. If he doesn't perform, he should be taken out of the organization." *Id.* at 19. The Board then agreed that "the Executive Director will revise the description and take appropriate action based on that job description." *Id.* at 20.

Apparently nothing was done to revise Mr. Hunt's job description, but in January 1983, at Chairman Mooney's direction, James Gilmartin, the CHA's new personnel director, held a "hearing" over complaints by Michael Davis, a housing manager, that Mr. Hunt had been rude and abusive.[3] Mr. Hunt was not present and was not informed of the hearing, which was attended by Mr. Gilmartin, Davis, Mr. Clark and two other CHA supervisors. At the hearing it was decided not to terminate Mr. Hunt "because of the lack of written documentation supporting the allegations." Plaintiff's Ex. 29 at 2. Mr. Gilmartin recommended that Mr. Hunt's position be eliminated, or that a revised job description be developed, and that thereafter Mr. Hunt's performance should be closely monitored and documented.

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[3] The minutes of the hearing indicate that Davis complained that Mr. Hunt had accused him in the presence of others of being incompetent and of stealing from the CHA. Davis later was terminated for practicing law at a local courthouse while he was supposed to be on the job at the CHA. *See* Plaintiff's Ex. 55.

Soon after, Mr. Clarke recommended that Mr. Hunt be terminated for attending a Board meeting without signing out from work and "while in the pay of the Chicago Housing Authority," in violation of a CHA rule (apparently unwritten) and Mr. Clarke's direct order. At trial, Mr. Clarke could not remember whether Mr. Hunt had ever before attended a Board meeting without signing out or why he had admonished Mr. Hunt not to do so. Mr. Hunt testified that he did sign out before going to the meeting. On February 23rd, after celebrating Harold Washington's victory in the democratic primary for mayor, Mr. Hunt came to work intoxicated, "knocked a little too hard" on the dispatcher's window, and broke it. Def.'s Exs. 16 & 17 (Incident Report of CHA Security Officer). Mr. Clarke and Mr. Gilmartin again recommended that Mr. Hunt be terminated, although at trial Mr. Gilmartin conceded that other CHA employees were not terminated for drunkenness except for multiple instances or a "severe problem in the field." Tr. Vol. 3 at 163-64.

On April 22 and April 25, 1983, Mr. Hunt worked late and missed the 4:30 deadline for signing out at the Central Maintenance office. Mr. Hunt testified that on the 22nd, when he realized that he would be late, he called the central office but was not put through to Mr. Clarke. He then went over to the central office, but was not allowed to sign out. On the 26th, Mr. Clarke told Mr. Hunt he was going to dock him for two days pay, and Mr. Hunt stated in response that Mr. Clarke knew he had worked and was a "damn liar." Mr. Clarke then suspended Mr. Hunt without pay. Mr. Hunt sent a written request for a grievance hearing to Mr. Clarke and Mr. Gilmartin. After Mr. Hunt was terminated with the approval of Chairman Mooney and the Executive Director, a hearing was held. A few days later, Mr. Gilmartin notified Mr.

Hunt in writing that it had been determined that his "termination was for just cause and in compliance with current CHA policies and procedures." Plaintiff's Ex. 43.

The CHA policies and procedures were adopted by the Board of Commissioners in 1978 and printed in a manual entitled "Personnel Procedures." The manual states that "discharges for cause shall be made only after adequate previous warning except in cases of extreme offense," *id.* at § 2019, and that "[a]n employee may be dismissed for just cause." *Id.* at § 2621. The manual also states that aggrieved employees have the "right to have any personnel action, condition or situation brought to the attention of administrative officials with a right to appeal to higher levels and to the Executive Director." *Id.* at § 2461. The purpose of the procedure is to assure just and equitable treatment to employees within the framework of the policies of the Commission." *Id.* Mr. Hunt testified that he read the CHA personnel procedures manual, including the section on termination for cause before beginning work at the CHA.

Mr. Gilmartin, who became the CHA's director of personnel in 1982, testified (after some refreshing of his recollection with his testimony at the earlier trial) that the personnel manuals were "all over the place" and "in every facility in the CHA." Tr. Vol. 2 at 147. He also testified that a purpose of the manuals was to define the rights of the employees, and that employees would telephone or write with questions about the policies.

B. *District Court Proceedings*

Hunt sued the CHA and individual defendants for terminating his employment in violation of his first amendment rights, procedural due process, and substantive due

process. He also alleged breach of contract (the contract being derived from written employment policies) and retaliatory discharge. Three jury trials of Mr. Hunt's claims took place. The first jury rendered a verdict in favor of Mr. Hunt, but the district court granted judgment notwithstanding the verdict in favor of the defendants. This court vacated the judgment n.o.v. and remanded for a new trial. At the second trial, the jury was unable to reach a verdict and a mistrial was declared.

A third trial was held. In preliminary proceedings, the court denied the individual defendants' motion for dismissal on grounds of qualified immunity.[4] It also ruled that under *Connick v. Myers*, 461 U.S. 138, 147 (1983), Mr. Hunt's criticisms of elevator maintenance were speech protected by the First Amendment and that, under *Rankin v. McPherson*, 483 U.S. 378, 388 (1987), Mr. Hunt's "free speech right far outweigh[ed] any interests the CHA m[ight] have as to efficiency." Tr. Vol. 21 at 731 (Dec. 11, 1989). The parties stipulated that, under state law, the Board of Commissioners of the CHA were policymakers for hiring and firing.

The jury found against CHA in favor of Hunt on his First Amendment claim, but found for the individual defendants. On Hunt's procedural and substantive due process claims, the jury found for Hunt against the CHA and individual defendants. On retaliatory discharge and breach of contract, the jury found for the defendants.

The district court denied the defendants' motion for a judgment n.o.v. or a new trial. The district court stated

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[4] No interlocutory appeal was taken from the district court's ruling on qualified immunity, although such an appeal was of course possible. *See Juriss v. McGowan*, 957 F.2d 345, 346 (7th Cir. 1992).

that there was sufficient evidence to support the verdict on the First Amendment claim, that the verdicts on the retaliatory discharge and contract claims were not inconsistent with the verdict on the first amendment claim. The district court also stated that there was sufficient evidence to support the verdicts on the procedural and substantive due process claims and to support a finding, which was necessary to those claims, that Mr. Hunt had a property interest in his employment.

II

ANALYSIS

The appellants appeal the district court's ruling that the individual defendants were not entitled to qualified immunity. They also contend that errors in the instructions to the jury necessitate a new trial, and they appeal the district court's denial of their motion for judgment notwithstanding the verdict or, alternatively, for a new trial.

A. *Qualified Immunity*

The district court held that the individual defendants' were not entitled to qualified immunity on any of Mr. Hunt's Constitutional claims. Because the jury found that the individual defendants were not liable on Mr. Hunt's First Amendment claims, the issue of qualified of immunity on appeal concerns only the due process claims. The district court denied the individual defendants qualified immunity on the due process claims, stating that "[t]he law has been clear since at least 1972 that an employee with a property interest in his employment is entitled to due process protection." Memorandum Opinion and Order,

No. 84 C 3564, at 3-4 (December 12, 1989).[5] The individual defendants appeal the district court's decision on qualified immunity in regard to both Mr. Hunt's procedural due process claim and his substantive due process claim.

This court reviews de novo a district court's summary judgment determination regarding qualified immunity. *See Upton v. Thompson*, 930 F.2d 1209, 1211 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1262 (1992). Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). For liability, the "right the official is alleged to have violated must have been 'clearly established' in a 'particularized' way and 'the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' " *Upton*, 930 F.2d at 1212 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "[I]n order to determine whether the law was clearly estab-

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[5] The district court's order and opinion stated that the defendants failed to raise the issue of qualified immunity for the *substantive* due process claims in its trial brief. The court ruled that the defendants had waived qualified immunity on that claim or, alternatively, that they were not entitled to qualified immunity. On appeal, appellants address the issue of qualified immunity for the substantive due process claim on the merits. They do not raise any challenge to the district court's finding that they waived the issue. However, while it is true that, in their brief to the district court on qualified immunity the defendants raised no distinct arguments specifically directed to substantive due process, their argument that Mr. Hunt had no property interest in his job was directed toward the "due process claims" (plural). Supplemental R.7. In his appellate brief, Mr. Hunt makes no mention the district court's finding of waiver on the issue of substantive due process.

lished at the time of the defendant's alleged violation, a court cannot look at the legal norm at issue in the abstract." *Green v. Carlson*, 826 F.2d 647, 649 (7th cir. 1987); *see also Warlick v. Cross*, Nos. 90-3170 and 90-3802, slip op. at 11 (7th Cir. July 17, 1992). "Rather, the test for qualified immunity is 'whether the law was clear in relation to the specific facts confronting the public official when [he or she] acted." *Green*, 826 F.2d at 649; *Warlick*, slip op. at 11. For Mr. Hunt to defeat the defendants' claim of qualified immunity on the due process claims, he must show "that he had a clearly established property interest in continued employment" with the CHA. *Hannon v. Turnage*, 892 F.2d 653, 656 (7th Cir.), *cert. den.*, 111 S. Ct. 69 (1990).[6] A property interest in employment must spring from a "legitimate claim of entitlement to it" under state law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The defendants submit that, if Mr. Hunt had such a right, it was not clearly established under Illinois law at the time of his firing in the spring of 1983. Whether a right is clearly established is also "a purely legal question which requires this court to apply a *de novo* standard of review." *Apostol v. Landau*, 957 F.2d 339, 342 (7th Cir. 1992). The burden is on the plaintiff to prove that the right in question was clearly established at the time of the alleged violation. *Hannon*, 892 F.2d at 656.

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[6] *See also Spuler v. Pickar*, 958 F.2d 103, 108 (5th Cir. 1992): To succeed in his challenge to the defendants' qualified immunity, Spuler must show that at the time the University determined to terminate his contract, a reasonable university official would have known that termination under like circumstances would have violated Spuler's due process rights. In sum, Spuler would have to show that a non-tenured professor had a clearly-established, constitutionally-protected interest in continued University employment, and that denying him tenure for financial reasons was arbitrary and capricious.

In *Duldulao v. St. Mary of Nazareth Hospital Center*, 505 N.E.2d 314 (Ill. 1987), the Illinois Supreme Court held that "when traditional requirements for contract formation are present, 'an employee handbook or other policy statement creates enforceable contractual rights.' " *Mitchell v. Jewel Food Stores*, 568 N.E.2d 827, 828 (Ill. 1991). Before the 1987 decision in *Duldulao*, however, cases in the Illinois intermediate appellate courts "trace[d] a wavering line . . . on the issue whether an employees' handbook or manual transforms employment at will into employment under contract." *Enis v. Continental Illinois Nat'l Bank & Trust Co.*, 795 F.2d 39, 40 (7th Cir. 1986). As the Illinois Supreme Court stated in *Duldulao*,

> This court has never specifically addressed the issue of employee handbooks. Our appellate court, however, has addressed the issue several times, with conflicting results. In *Carter v. Kaskaskia Community Action Agency* (1974), 24 Ill. App.3d 1056, 322 N.E.2d 574, the court held that an employee manual, which was introduced after the employee began working and was written with input from the employees, created enforceable contractual rights. However, in *Sargent v. Illinois Institute of Technology* (1979), 78 Ill. App.3d 117, 33 Ill Dec. 937, 397 N.E.2d 443, the court distinguished *Carter* and held that the handbook in question was not binding because it was given to the employee when he first began work and was not specifically "bargained for." (78 Ill. App. 3d 117, 33 Ill. Dec. 937, 397 N.E.2d 443.)

Duldulao, 505 N.E. 2d at 317. The only federal court to have addressed the issue under Illinois law before 1983 followed *Sargent*. *See Rynar v. Ciba-Geigy Corp.*, 560 F. Supp. 619 (N.D. Ill. 1983). Although, by the time of the Illinois Supreme Court's decision in *Duldulao*, "the overwhelming majority of courts considering the issue ha[d] held that an employee handbook m[ight], under proper cir-

cumstances, be contractually binding," *Duldulao*, 505 N.E.2d at 317, nearly all of the many cases cited by the Illinois Supreme Court in *Duldulao* were decided in 1984 or after. *See id.* Thus, we must conclude that in 1983, at the time of Mr. Hunt's firing, it was not yet clearly established that an employee manual or handbook could create a property interest in employment under Illinois law, particularly in the circumstances present here. The individual defendants were entitled to qualified immunity on Mr. Hunt's due process claims.

B. *Jury Instructions*

1. Standard of review

This court's review of jury instructions is limited. *See New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1483 (7th Cir. 1990). "When reviewing a challenge to a jury instruction, we must view the instruction as a whole and consider the challenged instruction 'both in the context of the other instructions given and in light of the allegations of the complaint, opening and closing arguments and the evidence of record.' " *Lynch v. Belden & Co.*, 882 F.2d 262, 267 (7th Cir. 1989) (quoting *General Leaseways, Inc. v. National Truck Leasing Ass'n*, 830 F.2d 716, 725 (7th Cir. 1987)). The instructions "must be construed in a 'common sense manner, avoiding fastidiousness, inquiring whether the correct message was conveyed to the jury reasonably well." *General Leaseways*, 830 F.2d at 725. Even if a jury instruction is determined to be erroneous, "we will not find reversible error absent some effect on the substantial rights of the parties." *Vaughn v. Willis*, 853 F.2d 1372, 1376 (quoting *General Leaseways*, 830 F.2d at 725); *see also Bruno v. City of Crown Point*, 950 F.2d 355, 360 (7th Cir. 1991) (jury verdicts not reversed " '[e]ven if we

should discern error in one or more instructions . . . unless we are persuaded the jury's understanding of the issue was seriously affected' " to the prejudice of the complaining party) (quoting *Wilk v. American Medical Ass'n*, 719 F.2d 207, 218-19 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984)), *cert. denied*, 112 S. Ct. 2998 (1992). The "burden of showing prejudice rests with the party raising the error at issue," *Vaughn*, 853 at 1376, and our determination as to prejudice must be based on the record as a whole. *Id.* at 1377.

Under Rule 51 of the Federal Rules of Civil Procedure, "[n]o party may assign as error the giving or failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Fed. R. Civ. P. 51. As this court has stated, "[t]he purpose of the objection is to give the trial court an opportunity to correct any errors it has made. Failure to properly object waives any challenge on appeal." *Bob Willow Motors, Inc. v. General Motors Corp.*, 872 F.2d 788, 794 (7th Cir. 1989); *see also Gong v. Hirsch*, 913 F.2d 1269, 1277 (7th Cir. 1990) (no plain error doctrine for civil jury instructions); *Deppe v. Tripp*, 863 F.2d 1356, 1361 (7th Cir. 1988) (same). "Not only must the party object to the jury instruction, its 'objection must be sufficiently detailed to draw the court's attention to the defect [in the jury instruction].' " *Sims v. Mulcahy*, 902 F.2d 524, 535 (7th Cir.) (quoting *Williamson v. Handy Button Mach. Co.*, 817 F.2d 1290, 1295 (7th Cir. 1987)), *cert. denied*, 111 S. Ct. 249 (1990).

2. Instructions on CHA's liability on constitutional claims

The jury instructions on Mr. Hunt's three constitutional claims each included a section on the circumstances in

which the jury could find the CHA (as opposed to the individual defendants) liable. On the free speech claim, the jury was instructed:

> In addition to the individuals who are defendants in Hunt's free speech claim, the Chicago Housing Authority is also a defendant. The Chicago Housing Authority, which is also called CHA, is a municipal corporation. Under Illinois law, CHA's board of commissioners is charged with the duty to make CHA's policy as to discharge of employees. To find CHA liable on Hunt's free speech claim, you must find CHA's board responsible for the unlawful conduct.
>
> CHA's board need not have put an unlawful policy in writing, however, Rather, you should find CHA liable on Hunt's free speech claim if you find either one, that the board decided to discharge Hunt for his speech, or two, that the board delegated the responsibility to make CHA's discharge policy to one or more other officials at CHA who then discharged Hunt for his speech, or three, that the board approved Hunt's discharge for his speech.
>
> If Hunt has merely shown that the CHA board failed to investigate the basis for his discharge, this does not amount to the board delegating its discharge policy, and you should find in favor of CHA on its free speech claim, even though you may find other defendants liable on this claim.
>
> However, if Mr. Hunt has shown [that the] CHA board failed to investigate the basis for his discharge after having been given reason to believe that he was being discharged for his speech, you may then find CHA liable.

Tr. Vol. 11 at 886. Essentially similar instructions were given with regard to CHA's liability on Hunt's procedural and substantive due process claims.

The appellants challenge the instruction quoted above on two grounds: (a) they submit that the final sentence,

permitting the jury to find CHA liable "if Mr. Hunt has shown [that the CHA board failed to investigate the basis for his discharge after having been given reason to believe that he was being discharged for his speech," is legally erroneous; and (b) they contend that it was error to submit to the jury the issue whether "the board delegated the responsibility to make CHA's discharge policy to one or more other officials at CHA." According to the appellants, this issue should have been decided by the court.

a.

The appellants challenge the portion of the instruction regarding liability for failure to investigate on the ground that the instruction "does not require either that the Board approved of Hunt's discharge or that it knew of an allegedly impermissible basis for it." Appellants' Br. at 26. Equating "reason to believe" or "reason to know" with "should know," they contend that this instruction allowed the jury to find CHA liable for "nothing more than negligence," and that " 'merely negligent or even grossly negligent misconduct by state officers is not actionable under section 1983.' " Appellants' Reply Br. at 12 (quoting *K.H. v. Morgan*, 914 F.2d 846, 852 (7th Cir. 1990). Citing *St. Louis v. Prapotnik*, 485 U.S. 112, 130 (1988), the appellants contend that a plaintiff must prove that "the authorized policymakers approved both the decision and the basis for it." Mr. Hunt argues that, read as a whole, the instruction properly requires the jury to find the CHA liable only if it was "responsible" for an unlawful act. Appellee's Br. at 45-46. He submits that the instruction makes clear that a mere failure to investigate was not sufficient basis for liability; that failure had to

be accompanied by knowledge or reason to believe that the discharge violated the Constitution.[7]

Any error was clearly not prejudicial. On the First Amendment claim, only the CHA was found liable; the jury found in favor of all the individual defendants. Thus, it is clear that the jury found that the CHA was directly responsible for firing Mr. Hunt in violation of his First Amendment rights. There is no realistic possibility that the jury based the CHA's liability on the theory that the CHA failed to investigate Mr. Hunt's discharge (or on the theories that it merely approved the discharge or that it delegated its policymaking authority to the individual

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[7] Although the terms "reason to believe" or "reason to know" are occasionally used interchangeably with "should know" or should have known," the terms are not synonymous. "The words 'reason to know' . . . denote the fact that the actor *has information* from which a person of reasonable *intelligence* . . . would infer that the fact in question exists" while "[t]he words 'should know' . . . denote the fact that a person of reasonable *prudence and intelligence* . . . *would ascertain* the fact in question in the performance of his duty to another." Restatement of Torts (Second) § 12 (1965) (emphasis added). The Restatement explains the difference:

> Both the expression "reason to know" and "should know" are used with respect to existent facts. These two phrases, however, differ in that "reason to know" implies no duty of knowledge on the part of the actor whereas "should know" implies that the actor owes another the duty of ascertaining the fact in question. "Reason to know" means that the actor has knowledge of facts from which a reasonable man of ordinary intelligence or one of the superior intelligence of the actor would either infer the existence of the fact in question or would regard its existence as so highly probable that his conduct would be predicated upon the assumption that the fact did exist. "Should know" indicates that the actor is under a duty to another to use reasonable diligence to ascertain the existence or non-existence of the fact in question and that he would ascertain the existence thereof in the proper performance of that duty.

Id. at § 12 cmt. a.

defendants). Moreover, the jury's verdict on the First Amendment claim renders it extremely doubtful that its verdicts against the CHA on Mr. Hunt's procedural and substantive due process claims were based on a theory of derivative liability.

b.

The same analysis holds with respect to delegation of policymaking authority.[8] Given the jury's determination that CHA was directly responsible for firing Hunt for speech protected by the First Amendment and its exoneration of the individual defendants, it is extremely unlikely that the jury's verdict on the due process claims

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[8] The Supreme Court has made it clear that the identity of those officials to whom state law has delegated policymaking authority is an issue for the court, not for the jury. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) ("[W]hether a particular official has 'final policymaking authority' is a question of state law. As with other question of state law relevant to the application of federal law, the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury."). In the present case, the district court properly decided that issue. It is somewhat less clear if the court must also decide whether an official possessing policymaking authority under state law has delegated that authority to another official. However, the Eleventh Circuit has stated that this also is an issue to be decided by the trial court before the case is submitted to the jury. *See Mandel v. Doe*, 888 F.2d 783, 792 (11th Cir. 1989).

Mr. Hunt asserts that the defendants waived this objection because they failed to include it in their written objections to the plaintiff's proposed instructions and only objected to it orally in conference before the district court (at which time, he further suggests, they misled the court into believing they had included the objection in their written objections). However, as the defendants point out, because Mr. Hunt did not object to this procedure below, he has waived waiver.

was based on the theory that the CHA delegated its policymaking authority to Clarke and Gilmartin, who then exercised that authority to discharge Mr. Hunt in violation of his due process rights. The erroneous submission of an issue to the jury does not require reversal or a new trial absent some prejudice caused by the error. *See Bob Willow Motors*, 872 F.2d at 796; *Woods v. Sammisa Co.*, 873 F.2d 842, 849 (5th Cir. 1989) (no new trial required if court is "reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it), *cert. denied*, 493 U.S. 1050 (1990). We are confident that the submission of the issue whether the CHA had delegated its policy-making authority did not affect the verdict.

3. Property interest

The appellants also challenge other portions of the instructions on the substantive and procedural due process claims. On Mr. Hunt's procedural due process claim, the court gave the following instruction to the jury to aid it in determining whether Mr. Hunt had a property interest in continued employment:

> The 14th Amendment to [the] United States Constitution prohibits any municipal corporation, such as CHA and by extension, any employee of CHA from depriving any person of property without due process of law. Employment can be property within the meaning of this constitutional protection. For instance, if Hunt had an employment contract with CHA that contract is property within the meaning of the constitution.
>
> Therefore, if in your deliberations on Hunt's contract claim, you find that the personnel policies in Plaintiff's Exhibit 46 constitute a contract, you should also find that Hunt had a property right in his em-

> ployment. Even if you do not find that the personnel policies in Plaintiff's 46 are a contract, however, Hunt can still prove that his employment constituted property and, therefore, can recover on his procedural due process claim.
>
> If you find that Hunt legitimately and reasonably relied on a promise from CHA that he would only be fired for just cause, you should find that plaintiff had a property right in his employment. To find that Hunt had a property right in his employment it is not necessary that Hunt and CHA reached agreement that he would only be fired for just cause at the same time or in the same conversation. Rather, it is only necessary that Hunt and CHA had a mutual understanding that he would be fired only for just cause. If you find that Hunt did not have a property interest in his employment whether as a contract or as a reasonable reliance on a promise you should find in favor of each of the defendants on the procedural due process claim.

Tr. Vol. 11 at 896-67 (February 15, 1990). The court instructed the jury that its finding on whether Mr. Hunt had a property interest in his employment for the procedural due process claim applied as well to Mr. Hunt's substantive due process claim.

Whether these instructions are legally correct, however, is an issue we need not decide. As Mr. Hunt points out, the appellants did not specifically object in the district court to the deficiencies they now allege in the instructions on property rights in employment. In the district court, the thrust of the defendants' objection was that it permitted the plaintiff to recover on the basis of "a unilateral expectation" or reliance on a "perceived" requirement that he would be fired only for cause. R.243 at 3. Since the portion of the instruction to which the defendants objected required the jury to find that "Hunt legitimately and reasonably relied on a *promise* from CHA that

he would only be fired for just cause and that "Hunt and CHA had a *mutual* understanding that he would be fired only for just cause," it is not surprising that the district court denied the defendants' objection. Tr. Vol. 11 at 896 (emphasis supplied).

The appellants now assert that it was "flatly inconsistent with Illinois law"[9] (which they properly assert must be the source of any property right) to instruct the jury that Mr. Hunt had a property right in his employment if he "legitimately and reasonably relied on a promise from CHA that he would only be fired for just cause." Appellants' Br. at 34. The appellants submit that "[t]he only conceivable basis under Illinois law for this standard is the theory of promissory estoppel," but that the instruction omits the "well-established" elements necessary to estoppel under Illinois law, namely that "(1) defendants made an unambiguous promise to plaintiff, (2) plaintiff relied on such promise, (3) plaintiff's reliance was expected and foreseeable by defendants, and (4) plaintiff relied on the promise to its detriment." *Id.* (quoting *Quake Constr., Inc. v. American Airlines, Inc.*, 565 N.E.2d 990, 1004 (Ill. 1990). Moreover, according to the appellants, because a municipal corporation is a defendant, the plaintiff's reliance must be substantial.

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[9] It is not clear under what circumstances a "mutually explicit understanding," *see Perry v. Sindermann*, 408 U.S. 593, 601 (1972), could give rise to a property interest in employment under Illinois law. *See Hohmeier v. Leyden Community High Sch. Dist. 212*, 954 F.2d 461, 465 n.2 (7th Cir. 1992); *Lee v. County of Cook*, 862 F.2d 139, 142-43 (7th Cir. 1988); *Leahy v. Board of Trustees of Community College Dist. No. 508*, 912 F.2d 917, 922 n.7 (7th Cir. 1990). However, we stated in *Hohmeier* that nothing in the caselaw "suggests that *Duldulao* provides the only way for a public employee to establish a property interest in his or her job." *Hohmeier*, 954 F.2d at 465.

The appellants now bring a specific and detailed challenge to the instruction. However, they failed to alert the district court to these defects by "stating distinctly the matter objected to and the grounds of the objection" in the district court, as Rule 51 requires, nor did they propose an instruction incorporating fully the theory they now urge. Therefore, the objection is waived. *See Sims*, 902 F.2d at 535.

4. Substantive due process

Appellants also challenge the jury instruction on substantive due process. The court instructed the jury:

> If you found that plaintiff had a property interest in his employment either as a contract or as reasonable reliance on a promise, the due process clause of the 14th Amendment prohibits plaintiff's discharge for reasons that are arbitrary or capricious or for improper motive.
>
> If you find that the defendants fired Hunt in violation of his right to free speech or in retaliation for his furtherance of a public policy of Illinois, those would be arbitrary, capricious and improper reasons for termination.
>
> Even if you find that Hunt's speech was not the reason for the defendant's [sic] termination of Hunt's employment or that the discharge was not in retaliation for Hunt's furthering of public policy of Illinois, however, you could find a violation of Hunt's substantive due process rights if you find that the defendants were arbitrary or capricious in firing Hunt or they acted in some irrational way.

Tr. Vol. 11 at 903. The defendants acknowledge that the first possibility for finding liability (if the defendants fired Mr. Hunt in violation of his right to free speech) was proper. The defendants challenge the second and third possibilities for finding liability (if the defendants fired Mr.

Hunt in retaliation for furtherance of Illinois public policy or simply were arbitrary, capricious or irrational in firing Mr. Hunt). It argues that these last alternatives were improper because they permit the jury to find that Mr. Hunt's right to substantive due process was violated by mere deprivation of property without a showing of some other separate constitutional violation or of the inadequacy of state law remedies.

This court has acknowledged that a substantive due process claim can be brought in the context of property interests. *See New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1480 (7th Cir. 1990). However, we have required that, "in addition to alleging that the decision was arbitrary and irrational, 'the plaintiff must also show either a separate constitutional violation or the inadequacy of state law remedies.' " *Id.* at 1481 (quoting *Polenz v. Parrott*, 883 F.2d 551, 558 (7th Cir. 1989). "In cases where the plaintiff complains that he has been unreasonably deprived of a state-created property interest, without alleging a violation of some other substantive constitutional right or that the available state remedies are inadequate, the plaintiff has not stated a substantive due process claim." *Kauth v. Hartford Ins. Co.*, 852 F.2d 951, 958 (7th Cir. 1988); *accord Sutton v. Cleveland Bd. of Educ.*, 958 F.2d 1339, 1351 (6th Cir. 1992). *But see Moore v. Warwick Pub. Sch. Dist.*, 794 F.2d 322, 329 (8th Cir. 1986). The instruction, then, insofar as it permitted the jury to find that defendants had violated Mr. Hunt's substantive due process rights in the absence of an independent constitutional violation or any demonstration that there were no adequate state remedies, was incorrect. Therefore we must determine whether the error was harmful.

As we noted above, an error is not harmful absent "some effect on the substantial rights of the parties." *Vaughn*, 853 F.2d at 1376 (quoting *General Leaseways*, 830 F.2d at 725). We shall not reverse a jury verdict " '[e]ven if we should discern error in one or more instructions . . . unless we are persuaded the jury's understanding of the issue was seriously affected' " to the prejudice of the complaining party. *Bruno*, 950 F.2d at 360 (quoting *Wilk v. American Medical Ass'n*, 719 F.2d 207, 218-19 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984)). Here, given our determination that the individual defendants are shielded by qualified immunity, we need examine only the effect of the instructional error on the CHA. *See Bruno*, 950 F.2d at 360. As the defendants concede in their brief, because the jury found the CHA liable for a separate constitutional violation—firing Mr. Hunt in violation of the First Amendment —, there can be no harmful effect from this erroneous instruction unless the jury's verdict against the CHA on the First Amendment claim is infirm. The CHA appeals that verdict on the ground that it is not sufficiently supported by the evidence. Because, as will become clear from our analysis below, it is our conclusion that the jury's verdict on Mr. Hunt's First Amendment claim must be upheld, it follows that the instructional error under discussion was harmless.

C. *Sufficiency of the Evidence*

1. Standard of review

The CHA appeals the district court's denial of judgment n.o.v., challenging the sufficiency of the evidence on both the First Amendment claim and the due process claims. We review de novo the district court's denial of a motion for judgment notwithstanding the verdict. *See Bruno*,

950 F.2d at 361; *Aungst v. Westinghouse Elec. Corp.*, 937 F.2d 1216, 1219 (7th Cir. 1991). In determining whether the evidence is sufficient to support the verdict, we take the evidence and all reasonable inferences from it in the light most favorable to the party winning the verdict. *Bruno*, 950 F.2d at 361; *Aungst*, 937 F.2d at 1219-20. We do not judge the credibility of the witnesses, nor do we weigh the evidence as a fact finder. *Collins v. Illinois*, 830 F.2d 692, 697 (7th Cir. 1987). "Rather, we 'weigh the evidence to the extent of determining whether the evidence to support the verdict is *substantial*; a mere scintilla of evidence will not suffice.' " *Collins*, 830 F.2d at 697-98 (quoting *La Montagne v. American Convenience Prods., Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984)).

When a jury instruction becomes the law of the case through a party's failure to object properly at trial, the party is precluded from arguing that the jury's verdict was contrary to the appropriate legal standard. *Sims*, 902 F.2d at 536. As this court has explained:

> If a party could argue that the evidence was insufficient under the correct legal standard, this would be an indirect method of attacking the instructions. . . . Once the law of the case is settled by the failure to object to the instructions, the parties may argue only that the jury did not play its proper part. Because the jury's part is to apply the instructions to the facts, we may scrutinize its conclusions only to find out whether it did so.

Will v. Comprehensive Accounting Corp., 776 F.2d 665, 675 (7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986); *see also Rakovich v. Wade*, 850 F.2d 1180, 1192 (7th Cir. 1988) (*en banc*), *cert. denied*, 488 U.S. 968 (1988).

We have examined the record thoroughly in light of these standards and are convinced that, with respect to

each claim, the district court was correct in denying the CHA's motion. The evidence, viewed in the light most favorable to Mr. Hunt, was sufficient to support the jury's verdicts both on the First Amendment claim and the due process claims, and, therefore, the district court's denial of judgment notwithstanding the verdict was correct.

Alternatively, the appellants submit that the district court erred in denying their motion for a new trial. "The authority to grant a new trial 'is confided almost entirely to the exercise of discretion on the part of the trial court.' " *Smith v. Great Am. Restaurants, Inc.*, Nos. 91-1793 & 91-1864, slip op. at 5 (7th Cir. July 24, 1992). "A district court may grant a new trial 'only where the verdict is against the clear weight of the evidence, and we will reverse the district judge's decision only where there is a clear abuse of discretion.' " *Trzcinski v. American Cas. Co.*, 953 F.2d 307, 315 (7th Cir. 1992) (quoting *M.T. Bonk Co. v. Milton Bradley Co.*, 945 F.2d 1404, 1407 (7th Cir. 1991)). "We will not set aside a jury verdict if a reasonable basis exists in the record to support the verdict." *Id.* In the present case, having examined the record in detail, we cannot say that the verdict is against the clear weight of the evidence. The district court did not abuse its discretion by denying the appellants' motion for a new trial.

Conclusion

For the foregoing reasons, the judgment of the district court entered in favor of Mr. Hunt and against the CHA is affirmed. The judgment of the district court denying the individual defendants qualified immunity is reversed.

AFFIRMED IN PART and
REVERSED IN PART

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JEROME HUNT, Plaintiff,	)	
v.	)	Case No. 84 C 3564
CHICAGO HOUSING AUTHORITY, et al., Defendants.	)	

[Docketed: September 13, 1990]

MEMORANDUM OPINION AND ORDER

Jerome Hunt sued the Chicago Housing Authority and various individual defendants for violation of his First Amendment rights, retaliatory discharge, breach of contact, violation of procedural due process, and violation of substantive due process. The jury found in his favor on the First Amendment claim against the CHA but not the individual defendants, on the procedural due process claim against the CHA and individual defendants, and on the substantive due process claim against all defendants. The defendants ask for a judgment notwithstanding the verdict and in the alternative for a new trial. This motion is denied. Mr. Hunt asks for further relief under Fed. R. Civ. P. 59(e) in the form of reinstatement or front pay, prejudgment interest, and attorneys' fees and costs. The court declines to order reinstatement, but grants the rest of Mr. Hunt's request.

Defendants first argue that the verdict in favor of Mr. Hunt on his First Amendment claim against the CHA cannot stand, since no individual defendants were found liable on this claim. This argument has no merit. Under *Monell*

v. New York Department of Social Services, 436 U.S. 658 (1978), the doctrine of *respondeat superior* does not apply in § 1983 claims such as Mr. Hunt's, so the CHA's liability was never wholly dependant on the acts of the individual defendants. CHA liability depended on its employment policy, as implemented either by the CHA Board or its delegate. *St. Louis v. Praprotnik*, 485 U.S. 112, 126-27 (1988). The CHA can therefore be liable independently of the individual defendants. *.Pembaur v. Cincinnati*, 475 U.S. 469, 475 (1986).

Defendants next argue that the evidence was insufficient to support the verdict against the CHA on the First Amendment claim. The court disagrees. The testimony regarding the November 23, 1982, December 20, 1982, and January 23, 1983 Board meetings, especially the hostile discussion of Mr. Hunt's criticisms, is enough to support the jury's conclusion that Mr. Hunt's First Amendment rights were violated.

The defendants seek a new trial based on what they allege are inconsistent verdicts. Apparently inconsistent verdicts should be reconciled if it is possible to do so. *Sterling v. Commercial Union, Ins. Inc.*, 674 F.2d 697, 700 (8th Cir. 1982). Although it is a close question, the court believes that the verdict on the First Amendment claim can be reconciled with the verdicts on the retaliatory discharge and contract claims. On the First Amendment claim, the jury was instructed that "plaintiff had a constitutional right to criticize the maintenance and repair of CHA's elevators. . . ." Jury Instruction 15. On the retaliatory discharge claim, the jury was instructed to find in favor of Mr. Hunt "If you find that CHA discharged Hunt in retaliation for activities in furtherance of that policy. . . ." Jury Instruction 18. "That policy" refers to Ill. Rev. Stat. ch. 67-1/2 § 24, and the state policy of providing efficient, decent, safe, and sanitary dwellings

for poor residents. It is thus possible that the jury focused on the phrase "in furtherance of that policy" rather than "retaliation" in Instruction 18, and felt that Mr. Hunt's criticism of CHA's elevator repairs did not further any important public policy. Instruction 18 and *Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 421 N.E.2d 876, 881 (1981). For the First Amendment claim, the jury had no freedom to question whether Mr. Hunt's criticism was entitled to First Amendment protection, as their verdict on the retaliatory discharge count indicates they might have. In other words, the jury evidently believed, for both counts, that there had been retaliation against Mr. Hunt. In Count 1, Mr. Hunt won because the jury had been instructed that his speech was protected (by the First Amendment). In Count 2, Mr. Hunt lost because the jury believed his speech was not protected (it did not further a public policy). The verdicts are consistent.

The defendants argue that the verdict for Mr. Hunt on his First Amendment claim is inconsistent with the verdict against him on the contract claim, unless the latter verdict constitutes a finding of no contract. On the contract claim, the jury was instructed that if the CHA fired Mr. Hunt in violation of the First Amendment, then that would constitute a firing without just cause. Instruction 20. However, Instruction 20 went on to say "If you find that CHA fired Hunt for some other reason, you must decide whether that reason constituted 'just cause' or not." Under this instruction, the jury could have believed that the "insubordination" of which the CHA accused Mr. Hunt was "some other reason," which it equated with "just cause" for firing him under the contract. This does not mean that the CHA met its burden of showing for the First Amendment claim "that they would have reached the decision to dismiss Hunt even if Hunt had not criticized CHA." Instruction 14. The verdicts are not inconsistent.

The court rejects defendants' arguments for a judgment notwithstanding the verdict on the due process claims. In the first place, the law of the case, as articulated by the Seventh Circuit when this case was first appealed, compels the conclusion that the jury could find that CHA policies constituted a contract. In the second place, Mr. Hunt presented sufficient evidence to support a finding that there was a contract under *Duldulao v. St. Mary of Nazareth Hospital*, 115 Ill.2d 482, 505 N.E.2d 314 (1987). Finally, there was sufficient evidence to support the verdicts on both the procedural and the substantive due process claims.

The court denies Mr. Hunt's motion for reinstatement and instead grants his request for front pay. From the court's many dealings with the parties, especially in the context of settlement conferences, the court believes that the relationship between Mr. Hunt and the CHA contains too much animosity to make reinstatement appropriate. Accordingly, the court instead awards Mr. Hunt front pay, to which the CHA has not objected. The court also awards Mr. Hunt $76,377 in prejudgment interest. Again, the CHA has not objected either to such an award or to the amount.

Mr. Hunt's petition for attorney's fees and costs is due on October 10, 1990. Defendants' response is due on October 24. There will be a status hearing on September 24, 1990 at 9:30 a.m. to discuss how to proceed on determining the amount of front pay.

E N T E R:

/s/ _____
Ann Claire Williams, Judge
United States District Court

Dated: SEP 11, 1990

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September 14, 1992.

Before
Hon. RICHARD A. POSNER, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

JEROME HUNT,	]	Appeal from the United
	]	States District Court for
Plaintiff-Appellee,	]	the Northern District
	]	of Illinois,
No. 90-3614 v.	]	Eastern Division.
	]	
CHICAGO HOUSING AUTHORITY, a municipal corporation, JAMES GILMARTIN and CHARLES CLARKE,	]	No. 84 C 3564.
	]	Ann Claire Williams,
	]	*Judge.*
	]	
	]	
Defendants-Appellants.	]	

O R D E R

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by defendants-appellants on September 2, 1992, no judge in active service has requested a vote thereon, and all the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing en banc be, and the same is hereby, DENIED.

APPENDIX D

RELEVANT STATUTORY PROVISION

42 U.S.C. § 1983:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.